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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 567

CHARLES H. ALBERS, FRANCES M. BLAKELY, C. W. BODEN, AVERY BRUNDAGE, JOHN KATSULOS, MARGARET L. KENT, PAUL E. KLING, THOMAS B. SHEARMAN, JAMES SULLIVAN AND EDITH WESTERCAMP, OWNERS OF CERTAIN SHARES OF NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY,

Petitioners,

VS.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To: *The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause.

OPINIONS BELOW

The opinion of the District Court (R. Vol. V,* page 251) is reported at 129 F. Supp. 392 (E.D. Mo. E.D. 1955).

The opinion of the Court of Appeals (Appendix A. Also R. Vol. VI) is reported at 225 F. (2d) 761 (C.A. 8th, 1955).

JURISDICTION

The judgment of the Court of Appeals (Appendix B. Also R. Vol. VI) was entered September 14, 1955.

Jurisdiction to issue the writ rests on Title 28, United States Code Section 1254.

QUESTION PRESENTED

The question presented is whether the Interstate Commerce Commission had power under Section 77 of the Bankruptcy Act (U.S.C.A. Tit. 11, sec. 205) to approve and certify to the United States District Court a plan of reorganization whereby a solvent debtor railroad would be compelled to merge with another debtor railroad without first obtaining a favorable vote of the stockholders of such solvent railroad pursuant to applicable state law.

Petitioners contend that the Commission has no such power, and that the District Court and the Court of Appeals erred in holding that such power existed. The position of petitioners may be summarized as follows: The requirements of Section 5 of the Interstate Commerce Act (U.S.C.A. Tit. 49, sec. 5) relating to railroad mergers must be complied with in reorganization proceedings under Section 77 of the Bankruptcy Act. Section 5 requires railroad mergers to be initiated by the carriers to be merged.

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* Nine copies of Vol. V of the Record are filed herewith pursuant to Rule 23(i) of this Court.

Solvent railroads can initiate mergers only by appropriate action of their stockholders taken pursuant to applicable state law. Additionally, Section 5(11) of the Interstate Commerce Act expressly requires a vote of stockholders of carriers to be merged as a condition precedent to the validity of a proposed merger.

The New Orleans, Texas & Mexico Railway Company is a solvent railroad.* The Plan seeks to compel a merger of New Orleans, Texas & Mexico Railway Company with Missouri Pacific Railroad Company. The Plan was not submitted to a vote of the New Orleans stockholders. Therefore, the Plan is invalid and the Commission had no power to submit it to the District Court.

The Plan is invalid and the Commission had no power to certify it to the District Court for the further reason that it was not submitted to a vote of the Missouri Pacific Railroad Company stockholders.

STATUTES INVOLVED

This case involves the following statutes:

The "consistency clause" of Section 77(f) of the Bankruptcy Act, *United States Code Annotated,* Tit. 11, Section 205(f).

Sections 5(2) and 5(11), of the Interstate Commerce Act, *United States Code Annotated,* Tit. 49, Sections 5(2) and 5(11).

Section 48 of Title 12 of the *Louisiana Statutes Annotated.*

Sections 351.410, 351.420 and 351.425 of *Vernon's Missouri Statutes Annotated.*

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* The stock of New Orleans was valued by the Commission at $250 per share (R. Vol. 5, pages 124, 199).

The pertinent portions of said statutes are set forth in Appendix C to this petition.

STATEMENT OF THE CASE

These are proceedings under Section 77 of the Bankruptcy Act for the reorganization of three principal debtors, Missouri Pacific Railroad Company (hereinafter called Missouri Pacific), New Orleans, Texas & Mexico Railway Company (hereinafter called "New Orleans") and International-Great Northern Railroad Company and their subsidiaries.

Petitioners are owners of 6,140½ or 71% of the 8,598 publicly held shares of New Orleans stock.

This petition seeks review of a decision of the Court of Appeals for the Eighth Circuit entered September 14, 1955, affirming an order of the District Court entered February 25, 1955 (R. Vol. V., page 251) approving a plan for the reorganization of the debtor railroads (hereinafter called "the Plan") approved by the Interstate Commerce Commission in its Seventh Supplemental Report issued July 29, 1954 (R. Vol. V, page 105), and in its Eighth Supplemental Report issued November 9, 1954 (R. Vol. V, page 238).

The original petitions for reorganization under Section 77 were filed by the three principal debtors on March 31, 1933. Two previous plans promulgated in 1940 and 1944, respectively, were initially approved by the Commission and the District Court, but failed to become effective.* A

*The 1940 Plan was initially approved by the District Court in June 1941 (39 F. Supp. 436) but was later remanded to the Commission in July 1943 (50 F. Supp. 936). A second plan submitted in 1944 was approved in December 1945 by the District Court (64 F. Supp. 64). That decision was affirmed by the Court of Appeals in August 1947 (163 F. (2d) 350). This Court granted certiorari (332 U.S. 850), and affirmed in June 1948 (335 U.S. 211), rehearing denied 335 U.S. 837.

third prior plan herein referred to as the "1949 Plan" was approved by the District Court in July 1950 (93 F. Supp. 832). The Court of Appeals affirmed in August 1951 (191 F. (2d) 265) and petitions for certiorari to this Court were denied in 1952.* The 1949 Plan was not confirmed by the District Court but, because of changed conditions, was returned to the Commission in November 1952 for further consideration pursuant to U.S.C.A. Tit. 11, Sec. 208(a)(1) (R. Vol. II page 141).

On January 8, 1954, on motion of Guy A. Thompson, Trustee of the debtor railroads, the District Court entered an order (R. Vol. II, pages 161, 165) authorizing said Trustee to offer his services to and cooperate with the parties in order that differences with respect to a plan of reorganization might be resolved and a final reorganization expedited.

On February 17, 1954, a report was issued by the Commission's Examiner recommending substantial changes in the 1949 Plan.

On May 12, 1954, the Trustee's efforts culminated in his submission to the Commission of a so-called "Agreed System Plan" of reorganization which was a modification of the plan approved by the Examiner. A majority of the parties signified by stipulation filed with this plan their willingness to support it (R. Vol. V, page 107). This plan with certain modifications became the Plan which was approved by the Commission, the District Court and the Court of Appeals.

On July 29, 1954, the Commission issued its Seventh Supplemental Report approving the 1954 Plan (R. Vol. V, page 105). Within the 60-day period allowed by statute these petitioners filed their petition with the Commission object-

*342 U.S. 904 and 918; 343 U.S. 929 and 982.

ing to the 1954 Plan as inequitable and asserting that it was invalid because the Commission had disregarded the standards and procedures prerequisite to the validity of a railroad merger under Section 5 of the Interstate Commerce Act (R. Vol. II, page 1, *et seq.*).

On November 9, 1954, the Commission issued its Eighth Supplemental Report approving the 1954 Plan and overruling all objections thereto (R. Vol. V, page 238). On November 10, 1954, the Commission certified the Plan to the District Court (R. Vol. IV, page 35249). Hearings on the Plan were held by the District Court on December 15, 16, and 17, 1954, at which these appellants appeared by counsel in support of their objections to the Plan and claims for equitable treatment (R. Vol. I, page 40, *et seq.*).

On February 25, 1955, the District Court entered its order overruling and denying all objections, approving the 1954 Plan and referring the matter to the Commission for acceptance or rejection by security holders (R. Vol. V, page 261). The Court of Appeals affirmed on September 14, 1955.

These petitioners took the position before the Interstate Commerce Commission and in the Courts below that the Plan is illegal and void and that the Commission had no power to approve and certify it to the District Court because the provisions of Section 5 of the Interstate Commerce Act were not complied with. Petitioners submit that this issue is one of grave national importance and one which should be resolved by a decision of this Court.

Petitioners also objected to the Plan before the Commission and the Courts below on the ground that the Plan is unfair and inequitable as applied to these petitioners. These objections are raised on this petition only to the extent that they point up the essential unfairness of dis-

regarding the provisions of Section 5 in Section 77 proceedings. The stock of New Orleans was found by the Commission to have a value of $250 per share (R. Vol. V, pages 124, 199). Nevertheless, under the Plan, these petitioners would be forced to accept for each share of New Orleans stock about $215.84 of miscellaneous bonds in another corporation (R. Vol. V, page 118; R. Vol. IV, page 35207). Such an involuntary conversion of an equity into a debt interest, is a drastic action, equivalent to a forced sale and, even if the consideration were adequate (and these petitioners contend it is not), would seem to be inequitable as a matter of law. In any event, petitioners should be entitled, in all fairness, to the safeguards prescribed by Section 5 of the Interstate Commerce Act.

BASIS OF FEDERAL JURISDICTION

Federal Jurisdiction in the District Court is based upon Section 77 of the Bankruptcy Act.

ARGUMENT

1. The Powers of the Commission with respect to Merger Plans under Section 77 of the Bankruptcy Act Are Subject to All of the Requirements and Restrictions of Section 5 of the Interstate Commerce Act.

In *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954)* (hereinafter called the *St. Joe* case) this Court considered the powers of the Commission under Section 77 of the Bankruptcy Act to approve and submit to the United States District Courts railroad reorganization plans providing for the merger of debtor railroads. The Court reviewed Section 77 of the Bankruptcy Act, Section 5 of the Interstate Commerce Act and the legislative histories of those Acts.

This Court determined that Section 5 of the Interstate Commerce Act is the Act primarily concerned with railroad mergers. It held that railroad mergers could be approved by the Commission in proceedings under Section 77 of the Bankruptcy Act only subject to the standards and in accordance with the procedures laid down in Section 5 of the Interstate Commerce Act for the protection of carriers, their security holders and the public.

The Court rejected the argument that Section 77 of the Bankruptcy Act supersedes and abrogates the merger provisions of the Interstate Commerce Act in railroad reorganization proceedings. The Court held that Section 77 is primarily concerned with internal corporate reorgani-

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*This case reversed *In re Florida East Coast Ry. Co.*, 201 F. (2d) 325 (C.A. 5th, 1953) which was an appeal from 103 F. Supp. 825 (S.D. Fla. 1952). A later order of the Florida District Court in this case, *In re Florida East Coast Ry. Co.*, 127 F. Supp. 278 (S.D. Fla. 1954), was reversed in *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 216 F. (2d) 832 (C.A. 5th, 1954), cert. den. 348 U.S. 963 (1955).

zations not with mergers. It held that the consistency clause of Section 77 incorporates into that section all of the restrictions and limitations of Section 5 of the Interstate Commerce Act. In short, it held that the safeguards with respect to mergers contained in the Interstate Commerce Act are fully applicable in bankruptcy proceedings under Section 77 to the same extent and with the same effect as if the debtor railroads were not in bankruptcy.

The Court quoted with approval the words of Chairman Burton K. Wheeler of the Senate Committee on Interstate Commerce* rejecting previous claims of the Commission that it could disregard the Interstate Commerce Act in Section 77 proceedings. The Court quoted Senator Wheeler, in part, as follows, page 313:

> *"The most that the Commission may claim under section 77 is that, if it has approved a consolidation by an order under section 5 of the Transportation Act, it may perhaps be able to give effect to that action in the course of reorganization proceedings.*
>
> "This is of importance in administering both statutes. The procedure and safeguards of the Transportation Act must be preserved as a matter of law and of right; * * *" (Emphasis added by the Court).

The Court said, pages 309, 310:

> "All of this of course is not to say that mergers cannot be carried out in the course of a §77 reorganization. It merely means that if they are, they must be consummated in accordance with all the requirements and restrictions applicable to mergers under the Act primarily concerned with railroad amalgamations, the Interstate Commerce Act. So far as here relevant that means that the merger must be worked out and put before the Commission by the merging carriers. It

*See S. Rep. No. 1170, 79th Cong., 2d Sess. 80-85.

also means that one carrier cannot be railroaded by the Commission into an undesired merger with another carrier.

"In short, the consistency clause of §77 incorporates by reference §5 of the Interstate Commerce Act, as amended. And the very heart of §5 is that a merger of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal by the merging carriers. This essential prerequisite for a merger between Florida East Coast and Atlantic Coast Line—two existing corporate entities—must be complied with, for by virtue of the consistency clause the command of Congress applies even if one of these carriers is in §77 proceedings just as much as it would if neither of the carriers were in receivership or trusteeship. The legislative incorporation of §5 into §77 should not result in its judicial mutilation."

Thus, a merger plan cannot legally be approved by the Commission unless the requirements of the Interstate Commerce Act are observed.

2. **The Plan Was Not Initiated by the Railroads to Be Merged As Required by Section 5 of the Interstate Commerce Act and Is, Therefore, Invalid and Unenforceable.**

In its opinion in the *St. Joe* case, *supra*, this Court pointed out that Congress had consistently denied to the Commission the power to initiate or force mergers upon railroads or their security holders. On page 305 of its opinion the Court said, with reference to Section 5 of the Interstate Commerce Act that "only mergers voluntarily initiated by the participating carriers are encompassed by that statute and sanctioned by it." On page 309 of the opinion, this Court said that Section 5 requires that, "the merger must be worked out and put before the Commission

by the merging carriers." With respect to the latter statement the Court added footnote 12 which states, in part:

> "In this connection it is important to remember that a railroad in §77 proceedings is not a defunct organism but remains a live and going concern. • • •
>
> "• • • Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of §77. See 5 Collier, Bankruptcy, §77.02. Thus, it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that *those who in the absence of §77 would wield the corporate merger powers must initiate and work out the merger now.* • • •." (Emphasis added.)

Those "who in the absence of Section 77 would wield the corporate merger powers" can only be the stockholders who own the railroad and have the power and right to determine its policies. Corporate powers of corporations and their stockholders are exercised pursuant to the laws of the states of their incorporation. New Orleans and Missouri Pacific are incorporated, respectively, under the laws of Louisiana and Missouri. The corporation acts of both of those states require mergers to be proposed by the directors and to be approved by the affirmative vote of the holders of two-thirds of the outstanding stock of each corporation to be merged at a duly called stockholders' meeting after notice specifically stating the purpose of such meeting. *Louisiana Statutes Annotated*, Tit. 12, Sec. 48;* *Vernon's Missouri Statutes Annotated*, Secs. 351.410, 351.420 and 351.425.**

*See Appendix C.
**See Appendix C.

In the instant case, the Plan was approved by the Commission and certified to the District Court without affording the stockholders of the carriers to be merged any opportunity whatsoever to vote on the merger sought to be imposed upon them and upon the railroads of which they are the equity owners. Consequently, those "who in the absence of Section 77 would wield the corporate merger powers" did not initiate the proposed merger. Therefore, the Commission has no power to approve the Plan or to certify it to the United States District Court. The Plan itself is invalid and void and cannot legally be effectuated. The District Court's order approving the Plan should be reversed.

3. The Plan Is Invalid and Unenforceable for the Further Reason That It Was Not Approved by the Stockholders of the Railroads to Be Merged as Required by Section 5(11) of the Interstate Commerce Act.

In the *St. Joe* decision this Court states, page 306, that one of the reasons why Congress has denied to the Commission the power to impose mergers on railroads is that, in such a situation, "Investors in one railroad would, contrary to their expectations, find their holdings transmuted into securities of a different railroad." As a safeguard against this evil, Section 5(11) of the Interstate Commerce Act provides that merger plans may be effectuated only:

> "* * * with the assent, in the case of a purchase, and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporations at a regular meeting of such stockholders, the notice of such meeting to

include such purpose, or at a special meeting thereof called for such purpose. * * *"

This provision is an essential and integral part of the procedures which the Commission is required to follow under the Act in connection with merger plans. In *Schwabacher* v. *U.S.*, 334 U.S. 182 (1948), this Court said with respect to Section 5 (page 194):

> "So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it 'will be consistent with the public interest,' (§5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§5(2)(b).) Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§5(11).)"

In the *St. Joe* decision, the proposed merger plan was held void because not initiated by the carriers to be merged. This Court was not called upon to decide whether the other requirements of Section 5 of the Interstate Commerce Act had been complied with. It is a fundamental and necessary part of the Court's holding, however, that Section 5 is incorporated by reference into Section 77. Mergers in proceedings under Section 77 "must be consummated in accordance with *all* of the requirements and restrictions" of Section 5. Under Section 5(11) stockholders of railroads to be merged are safeguarded by the requirement of a favorable stockholder vote under applicable state law as a prerequisite to the validity of the merger.

The assent of the stockholders of the carriers to be merged is thus necessary under Section 5 for two entirely

independent reasons: (1) in order to comply with the requirement that mergers must be initiated by the carriers to be merged, and (2) in order to comply with the provisions of Section 5(11). Neither of these basic requirements has been complied with in the instant case.

Consequently, the Commission has erroneously assumed the power to approve a merger contrary to the provisions of Section 5 of the Interstate Commerce Act and the law of the land as laid down by this Court. The judgment of the Court of Appeals affirming the judgment of the District Court approving the void and illegal Plan which incorporates this merger should be reversed by this Court.

4. **The Courts Below and the Commission Erred in Determining that the Plan Proposes a Merger of Parent and Subsidiary Which Should Be Treated as an Internal Reorganization and that Section 5 of the Interstate Commerce Act Is Therefore Inapplicable.**

In its 8th Report (R. Vol. V, page 243), the Commission points out that this Court in the *St. Joe* case (Note 12, page 309) left open the question of forced mergers in situations where the "merger involved a parent and its subsidiaries and was treated essentially as an internal reorganization." The District Court also stated in its opinion (R. Vol. V, page 258) that the contention of these petitioners "ignores" this aspect of the *St. Joe* opinion. However, the instant case does not involve a merger of parent and subsidiary corporations which should be treated as an internal reorganization.

In a case where the parent corporation owns and is in a position to vote substantially all the stock of a subsidiary, a merger of the two corporations may perhaps be viewed as an internal matter and the voting of the subsidiary stock

a mere formality. However, to the extent that parties other than the parent have an interest in, and the right to vote stock of the subsidiary, the internal nature of the merger disappears. Where the parent does not own and have a right to vote a sufficient percentage of the stock of the subsidiary to insure a favorable vote under the applicable statutes, there is no justification for treating the merger as purely internal. In such case the independent stockholders of the subsidiary must be accorded their legal right to vote on any proposed merger of their corporation. If the foregoing rationale is applied in the instant case, it becomes apparent that no internal merger is involved.

There are issued 148,329 shares of New Orleans common stock of which 139,731, or about 94% are nominally owned by Missouri Pacific. Of these 139,731 shares, 121,460 (81.9% of the outstanding stock) are pledged to secure $10,425,000 outstanding principal amount of Missouri Pacific 5¼% Secured Serial Bonds, and an additional $1,715,000 principal amount of said bonds held by the bankruptcy trustee. An additional 18,268 shares are held by the bankruptcy trustee as collateral for certain notes (R. Vol. V, page 68).

Since the Missouri Pacific 5¼% bonds have been in default for many years, Missouri Pacific has had no right to vote the pledged shares. That right, under the indenture securing those bonds, passed to the indenture trustee. To insure joint operation of the debtor roads during the bankruptcy proceedings the District Court required the indenture trustee to give proxies to the bankruptcy trustee for the limited purpose of authorizing him to elect the New Orleans board of directors but for no other purpose (R. Vol. II, page 127). The individual bondholders have been recognized as the persons entitled to vote the pledged shares with respect to any plan or merger. On April 11, 1941, the District Court included the publicly held and pledged New

Orleans stock in a single classification (Class 3) for voting purposes (R. Vol. V, page 249). The District Court's order of February 25, 1955, directed the Interstate Commerce Commission in canvassing ballots on the confirmation of the Plan to count a vote in respect of each $1,000 or $500 principal amount of 5¼% Secured Serial Bonds as a vote in Class 3 for 10 or 5 shares, respectively of New Orleans stock (R. Vol. V, page 265).

Since Missouri Pacific has no right to vote any of the shares of New Orleans, the instant situation does not involve a merger of parent and subsidiary which can be treated as an internal reorganization, and the principles set forth by this Court in the *St. Joe* case are applicable.

5. The Law of the St. Joe Case Applies Despite Incidental Factual Differences.

The Commission and the Courts below lay considerable stress on the factual differences between the situation before the Court in the *St. Joe* case and the situation here involved. In that case the Commission sought to force a merger of the Florida East Coast Railroad Company and the Atlantic Coast Line Railroad Company over the objection of the bondholders of the Florida East Coast Railroad. Since it appeared that the Florida East Coast Railroad was insolvent, and that there was no equity for the stockholders of that road, those bondholders were, in effect, the equity owners of the railroad and stood in substantially the same position as the New Orleans stockholders in the instant case. One difficulty with the application of Section 5 of the Interstate Commerce Act in that case arose from the fact that Section 5 was drafted primarily with reference to the rights of stockholders in solvent railroads. This difficulty is not present in the instant case, since the

New Orleans stockholders come before this Court as equity owners of a solvent railroad. If bondholders are entitled to the protection of Section 5, it follows *a fortiori*, that stockholders of the solvent New Orleans are entitled to that protection here.

The essence of the law laid down by the Supreme Court in the *St. Joe* case is that railroad mergers can be effectuated by the Commission only subject to the provisions of Section 5 of the Interstate Commerce Act and that those provisions are not abrogated by, but are incorporated into Section 77, of the Bankruptcy Act and are applicable in proceedings under that section. The law is equally applicable in the instant case.

In the *St. Joe* case the Commission sought illegally to arrogate to itself under Section 77 of the Bankruptcy Act the power to force the bondholders of Florida East Coast Railroad by a merger to surrender their securities in that railroad for other securities in a different railroad. The United States District Court in that case compared this to a forced sale. It stated:

> "Technically, these 5% bondholders are not now the owners of the legal title to the property, but are creditors holding a lien. In equity and good conscience, however, this railroad belongs to the 5% bondholders, subject only to equipment obligations, and to the lien of the first mortgage, funds to pay off the latter being presently available. The 5% bondholders own the equity in the property, after satisfying these obligations. To deprive them of the equitable ownership of this property in which they have invested their money and which they desire to retain, and over their active objections to require them to accept in lieu thereof unwanted securities in an entirely different and unrelated railroad corporation, in the management of which they would have no voice, is intrinsically unfair and inequitable. This is so even though the new securities

in the other railroad may have an ostensible value equal to that of the present securities of the debtor railroad. If persons are to be thus deprived, *in invitum*, of their lawfully held property and forced over their objection to accept in lieu thereof property of debatable value which they do not want, while the property they now lawfully own and wish to retain is awarded to a stranger who wishes to acquire it, the exercise of such a drastic and far-reaching power—approaching absolutism in Government even in the case of a public utility—should rest upon considerations more compelling than those offered by the Commission in support of its fourth plan." *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825, 835 (D.C.S.D. Fla. 1952).

The same evil sought to be worked upon the Florida East Coast bondholders in that case is sought to be worked upon the New Orleans stockholders in this case. The Commission seeks by the proposed Plan and merger to compel them to surrender their stock in New Orleans for bonds in a different railroad. This it could do, if at all, only by complying with all the requirements of Section 5 of the Interstate Commerce Act. The Commission did not comply with those requirements. It has no power to approve the Plan or certify it to this Court. The Plan is void and unenforceable. The order of the District Court approving the Plan should be reversed.

6. This Petition Should Be Granted Because the Decision of the Court of Appeals in Conflict with the Decision of This Court in the St. Joe Case.

In this case the Interstate Commerce Commission has once again arrogated to itself the power to approve merger plans under Section 77 of the Bankruptcy Act without complying with Section 5 of the Interstate Commerce Act.

Its action was in conflict with the law of the land as enunciated by this Court in the *St. Joe* decision. The District Court and the Court of Appeals sanctioned the illegal action of the Commission. The decisions of those Courts, while paying lip service to Section 5 of the Interstate Commerce Act and the *St. Joe* decision, are clearly in conflict with the letter and the spirit of both.

It is apparent from the reports of the Commission and the opinions of the Courts below that they were strongly influenced by a desire to bring about the conclusion of a reorganization proceeding which had been pending since 1933, by the fact that many of the parties agreed to the plan in advance and by the fact that the interests of these petitioners and other objecting parties represented a comparatively small portion of the total value of the debtor railroads.* However, legal issues should not be determined on the basis of expediency or the dollar interest of those bringing them before the courts. Such considerations are the more inappropriate in the instant case because the issues present important questions of national interest. This Court has not hesitated to grant a hearing, or to do justice under similar circumstances. See *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, 114, 115, 128, 129 (1939); *Schwabacher* v. *U.S.*, 334 U.S. 182, 201 (1948). In the *St. Joe* case this Court said (page 314):

> "And so, if a plan does not satisfy the basic conditions which circumscribe the Commission's power, it has a congenital defect, and *any interested party* can object to its attempted effectuation." (Emphasis added.)

A writ of certiorari should issue in this case in order

* At the Commission's valuation of $250 per share the stock of New Orleans owned by these petitioners has a value of $1,535,125.

that the conflict between the opinion of the Court of Appeals and that of this Court in the *St. Joe* case may be resolved.

7. **This Petition Should Be Granted Because the Decision of the Court of Appeals Decided an Important Question of Law Which Has Not Been, But Should Be Settled By This Court.**

It is submitted that the Commission did not comply with even the minimum requirements of Section 5 and that the decisions of the District Court and Court of Appeals clearly conflict with that of this Court in the *St. Joe* case. However, if it should be considered by this Court that the questions raised on this petition are not resolved by the *St. Joe* decision, the petition should nonetheless be granted in order that those questions may be settled.

The issues presented by this case involve the interrelation of two basic statutes governing vital aspects of the national transportation system. It is important that these issues be resolved in order that the procedures to be followed in merger cases arising during Section 77 proceedings may be clearly defined and in order that the legislative purposes of Section 5 of the Interstate Commerce Act may not be frustrated.

The decision of this Court in the *St. Joe* case has not provided a clear guidepost in this area. Questions concerning the meaning and implications of the decision were raised at the very outset in the opinion of the dissenting Justices. 347 U.S. 321. The reorganization of the Florida East Coast Railway Company, to which the *St. Joe* decision related, was promptly mired in a morass of conflicting opinions as to the meaning of that decision. The opinion of District Judge Strum (127 F. Supp. 278), and the opinion of the Court of Appeals for the Fifth Circuit reversing

Judge Strum, the concurring opinion of Circuit Judge Holmes and the special concurring of Circuit Judge Russell (216 F. (2d) 832, cert. den. 348 U.S. 963) provide convincing proof of the confusion engendered by the *St. Joe* decision.

A point by point discussion of the opinions of the Commission and the District Court would be out of place in this petition. Petitioners submit, however, that those decisions are not only erroneous, but that their strained reasoning is further evidence of the need for a clear exposition by this Court of the applicable rules of law. The summary endorsement by the Court of Appeals of the opinion of the District Court was an abdication by that Court of its duty to consider the important issues presented. That Court's suggestions that a prior denial of certiorari by this Court was a determination of the issues presented here, and that this Court intended by implication to exclude the instant reorganization from the scope of its decision in the *St. Joe* case are patently unsound. Like the Commission and the District Court the Court of Appeals was willing to distort the holdings of this Court, and to sacrifice the rights of these petitioners for the purpose of effecting the will of the majority as set forth in the "Agreed Plan." The result is a shocking triumph of expediency over justice.

Thus, confusion and misunderstanding with respect to the meaning and scope of the *St. Joe* decision has resulted in unfortunate and costly delays in two important railroad reorganizations. In the instant case the Courts below have condoned the emasculation of Section 5 of the Interstate Commerce Act and the perpetration of the very evil which that decision was intended to do away with.

The application of Section 5 of the Interstate Commerce Act to mergers of railroads in Section 77 proceedings

should be further defined and clarified by this Court in order that the rights of security holders may be safeguarded and delays in railroad reorganizations held to a minimum.

CONCLUSION

The decisions of the Interstate Commerce Commission and of the Courts below are in conflict with the decision of this Court in the *St. Joe* case. The issues presented involve important questions of federal law which have not been, but should be clearly and definitively settled by this Court. This petition should be granted, and the writ of certiorari should be issued.

Respectfully submitted,

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December 12, 1955.

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit—Filed September 14, 1955.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,337.

Charles H. Albers, Frances M. Blakely, C. W. Boden, Avery Brundage, John Katsulos, Margaret L. Kent, Paul E. Kling, Thomas B. Shearman, James Sullivan and Edith Westercamp, Owners of Certain Shares of New Orleans, Texas & Mexico Railway Company,

Appellants,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 14, 1955.]

Before SANBORN, WOODBROUGH and VAN OOSTERHOUT, Circuit Judges.

WOODBROUGH, Circuit Judge.

On February 25, 1955 Judge Moore entered final orders in the proceedings under Section 77 of the Bankruptcy Act, 11 U.S.C.A. 205, entitled "In the Matter of Missouri Pacific Railroad, Debtor" approving the fourth Plan of Reorganization submitted to the Court by the Interstate Commerce Commission. The Orders were accompanied by the Court's Memorandum Opinion, 129 F. Supp. 392, and

Findings of Fact and Conclusions of Law and all objections to the plan and all claims for equitable relief other than provided in it were overruled and denied. The details of the plan as approved appear in Volume LXIV of the Missouri Pacific Reorganization Proceedings. The distribution of cash and new securities under the plan is in accordance with the Commission's "Appendix J" which is published with Judge Moore's Memorandum Opinion. The opinion includes an account by statement and reference of the proceedings and adjudications that have been had in the Matter since its initiation in 1933.

The record in the appeals shows that on January 8, 1954 the court entered an order which authorized Guy A. Thompson, Trustee of the Debtor Companies, to cooperate with the parties in the proceedings to aid them to compose differences with respect to a plan of reorganization and on February 18, 1954 Commissioner Richard F. Mitchell expressed the hope in connection with a supplemental report in the proceedings that "settlement satisfactory to the parties can be effected." Thereafter, following conferences and negotiations (fully reported), the Trustee, in a petition to the Commission, presented to it stipulations signed by nearly all of the major parties in interest to the reorganization proceedings approving and agreeing to support what was described and referred to therein as an "Agreed System Plan". This plan modified in certain respects the plan approved by the Examiners in their Proposed Report of February 17, 1954, which was a modification of the Commission's 1949 modified plan. The Trustee's petition and the stipulations were filed with the Commission on May 12, 1954 and the modified Plan of Reorganization contained therein was approved by the Commission and filed with the District Court on November 12, 1954. The court approved plan before us is the "Agreed System Plan" also referred to as the 1954 Plan.

The designation "Agreed Plan" is not a misnomer. No other plan of reorganization in this matter has received the support of such vast preponderance of affected interests as is shown by the stipulations that were signed and submitted and holders of securities amounting to many millions of dollars who opposed the earlier plans are now agreeing to and approving this one. The holdings of those who are still opposing the approved plan probably do not equal one third of one per cent of the market values involved in the case. If regard is had to the numbers of parties in interest, the contrast is much greater. Prior to the hearings in the District Court for approval of the plan, objections and claims for equitable treatment were filed by eight groups, but only three appeals, Nos. 15,335, 15,336, 15,337, have been taken to this court from the judgment approving the plan.

The appeal in Number 15,336 was taken by Bolton Sullivan and Stewart Huston, so-called "Independent Directors of Missouri Pacific Railroad Company." They filed objections and claims for equitable treatment in the District Court and were permitted to participate in the hearing subject to the objection that they have no authority to represent the debtor, its Board of Directors, or any defined or determinable group of creditors, stockholders or others having a right to be heard. At the conclusion of the hearing, the District Court sustained the objection to the participation of these appellants in the proceedings and cited our decision in *Huston* v. *Thompson, Trustee,* 217 F.2d 308. In that case we held that these appellants lacked power of representation exactly as stated in the objection. They have no authority to represent "any party in interest" within the intendment of Section 77(e) or to represent "any * * * interested party" within Section 77 (c) (13). They are bound by the action of the Board of Directors of Missouri Pacific approving the plan. The court did not err

in sustaining the objection against their participation and in refusing to consider their opposition to the plan. Although we heard oral argument for them and have studied their brief, we direct that their appeal be dismissed.

The appeal in Number 15,335 is taken in the name "Missouri Pacific Railroad Company 5¼% Secured Serial Bond Holders' Committee" which filed its objections to the Plan of Reorganization in the District Court on December 3, 1954. It alleged that it had been authorized to act in behalf of said bonds by Order of the Interstate Commerce Commission entered in the Matter of the Missouri Pacific Railroad Company on October 15, 1947 and it set forth forty-five grounds of objection. But on its present appeal, it has relied in its brief and oral argument upon the single point that "The present Agreed System Plan is illegal because there has been no compliance with the provisions of Section 5 of the Interstate Commerce Act" and it has cited only *St. Joe Paper Company* v. *Atlantic Coast Line Company*, 347 U.S. 298 and the statutes. The amount of the bonds represented by the appellant is not definitely shown but the 5¼% Secured Bond issue is recorded under indenture in the name of the Chemical Corn Exchange Bank and the bank approves the plan. Mr. DeLancey C. Smith, who is authorized to speak for about $5,000,000 of the $10,425,000 issue, does likewise.

The third appeal numbered 15,337 is prosecuted by Charles H. Albers and nine other individuals who are found by the District Court to be holders of capital stock of the New Orleans, Texas and Mexico Railway. It was shown that they hold about 6,140 shares or slightly in excess of four per cent of the outstanding shares of such stock which was acquired by them between 1945 and 1953 during which period the open market price averaged less

than a hundred dollars a share according to Moody's Financial Service. The Chemical Corn Exchange Bank is the record owner of 121,400 shares or more than 81% and Guy A. Thompson as trustee of the Missouri Pacific, Debtor, holds 12% or 18,271 shares of the total share issue. The Bank and Thompson approve the plan.

The group as now constituted first appeared in the proceedings on September 28, 1954 petitioning for modification of the Commission's 7th Supplemental Report and Order and none of the group filed any exceptions to the Examiner's proposed report of February 17, 1954. They offered no material testimony at the hearing in District Court to show that the plan they oppose will damage their interests and left the finding of the court to the contrary to rest on uncontradicted testimony and they rely here, as they did in District Court, on legal argument to establish that they have been materially prejudiced by the Orders appealed from. That they have a technical right to prosecute an appeal is not disputed.[1]

All appellants contend in this court, as they did before the Commission and in the District Court, that the Commission lacked power to approve and certify to the court a plan providing, as does the presently approved plan, for the merger of the Debtor Companies. The 1949 Plan submitted to the District Court embodied the same merger of the debtors and the same objection was urged against it before the District Court and on appeal to this court. The District Court overruled the objection and this court on full consideration affirmed. Petitions for certiorari were

1. The Commission has certified that in the vote taken, for acceptance or rejection of the Plan by the Commission since the orders appealed from herein were entered, the Plan is approved by overwhelming majority by both the stock and creditor interests in the Debtor Companies.

duly presented to the Supreme Court to review the decision of this court in which our ruling on the objection was assigned as error. It was argued at length in support of a petition for certiorari that "The Commission had no power to impose the consolidation" and that "the requirements of Section 5 of the Transportation Act were consciously ignored by the Commission." The Supreme Court denied certiorari, 343 U.S. 918, and a memorandum in connection with the denial by Mr. Justice Frankfurter is reported at 343 U.S. 982. The memorandum makes direct reference to the fact that "The Commission's plan also eliminates existing corporations and directs financial power into new channels."

The main reliance of the appellants to support the contention that the merger embodied in the plan herein is illegal is upon expressions appearing in the opinion of the Supreme Court in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298. The opinion in that case was also written for the court by Mr. Justice Frankfurter and therefore may be read in the light of his acquaintance with what he referred to as the "long drawn out Missouri Pacific reorganization." When so read, the opinion in the *St. Joe* Case does not support the contentions of the opponents of this plan. On full consideration we conclude that Judge Moore has fairly set forth in his opinion the facts relative to the appellants contentions concerning merger, the applicable law, the proper analysis and relevant import of the *St. Joe* Case and has fully supported his conclusions that the report of the Commission should be approved as to the merger provisions embodied in it.

The other main contention that was urged in the District Court on behalf of the appellants in No. 15,337 and is repeated by it here is that the treatment accorded the common stock of the New Orleans, Texas and Mexico Railway

is unfair and inequitable and that the Commission failed to apply applicable legal standards to it. The same contentions were urged by holders of the same stock against the 1949 plan. They were overruled by the District Court and the ruling was affirmed here. The contentions were presented to the Supreme Court in petitions for certiorari duly filed and the writ was denied. The present plan accords more favorable treatment to this stock than prior plans and the findings of the Commission in respect to it are amply supported. On full consideration of the record, briefs and argument, this court is in accord with the approval of the District Court of the findings and conclusions of the Commission in respect to the treatment accorded by the present plan to the NOT&M stock.

In view of the extended reasoned reports of the Commission fully covering the points of appellants here, and the carefully prepared opinion of the District Court which meets and disposes of the contentions of appellants, and of our own discussion of the same issues concerning NOT&M stock on the former appeal 191 F. 2d 265, no good purpose could be served by further repetitious discussions of details. Our study of the record, briefs and arguments has not disclosed error on the part of the District Court. We adopt the Memorandum Opinion of the District Court as correctly disposing of the issues and fully supporting the Orders complained of.

Said Orders appealed from in Nos. 15,335 and 15,337 are in all respects affirmed.

A true copy.

Attest:

E. E. Koch
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

APPENDIX B

Judgment of the Circuit Court of Appeals for the Eighth Circuit, Entered September 14, 1955.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15337.....September Term, 1955
Wednesday, September 14, 1955

Charles H. Albers, Frances M. Blakely, C. W. Boden, Avery Brundage, John Katsulos, Margaret L. Kent, Paul E. Kling, Thomas B. Shearman, James Sullivan and Edith Westercamp, owners of certain shares of New Orleans, Texas & Mexico Railway Company,

Appellants,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Orders of the said District Court appealed from in this cause be, and they are in all respects hereby, affirmed.

September 14, 1955.

APPENDIX C

Relevant Portions of Statutes Referred to in this Petition.

The "consistency clause" of Section 77(f) of the Bankruptcy Act, U.S.C.A., Tit. 11, Sec. 205(f) provides:

> " * * * Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. * * *"

The relevant portion of Section 5(2) of the Interstate Commerce Act, U.S.C.A., Tit. 49, Sec. 5(2) is as follows:

> "(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (1) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; * * *
>
> (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for

interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *"

The relevant portion of Section 5(11) of the Interstate Commerce Act, U.S.C.A., Tit. 49, Sec. 5(11) is as follows:

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; * * *"

Section 48 of Title 12 of the *Louisiana Statutes Annotated* provides:

Sec. 48. Merger or consolidation; joint agreement for

"The merger or consolidation of corporations and foreign corporations can be effected only as a result of a joint agreement entered into and filed as follows:

"A. The board of directors of each of the corporations or foreign corporations as desire to merge or consolidate may, by majority vote, enter into a joint agreement signed by the directors and prescribing the terms and conditions of merger or consolidation, the mode of carrying the same into effect, with any other details and provisions as are deemed necessary.

"B. The agreement shall be submitted to the shareholders of each of the merging or consolidating corporations and foreign corporations at meetings thereof duly called and specifically and separately held, and unless otherwise provided in the articles of the corporations and foreign corporations, or either of them, if at the meetings the holders of two-thirds of each class of the voting power of all shareholders entitled to vote in each corporation or foreign corporation shall vote for the adoption of said agreement, then that fact shall be certified on the agreement, by the secretary of each meeting, and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of the corporations or foreign corporations, and acknowledged by the president or vice-president of each of the corporations or foreign corporations involved.

"C. The shareholders of each corporation and foreign corporation shall have the right, unless otherwise provided in the articles of said corporations, or either of them, by the vote of the holders of two-thirds of the voting power, to adopt any amendment to the agreement they may deem proper, and if such amendment be concurred in by the respective boards of directors of all the merging or consolidating corporations, and by two-thirds of the voting power of the other corporation or foreign corporation, the agreement so amended,

when so certified, signed and acknowledged, shall be considered the merging or consolidating agreement.

"D. The agreement so adopted, certified and acknowledged shall be delivered to the Secretary of State, who shall file and record the same in his office, and a copy thereof certified by the Secretary of State shall be filed for record in the office of the Recorder of Mortgages in each parish in this state in which any of the corporate parties to the agreement shall have its registered office, and shall also be recorded in the conveyance records of each parish in this state in which any of the corporate parties to the agreement has immovable property, title to which will be transferred as a result of the merger or consolidation."

Sections 351.410, 351.420 and 351.425 of *Vernon's Missouri Statutes Annotated* provide:

"*351.410. Merger procedure*

"Any two or more domestic corporations formed for a purpose for which a corporation may be formed under this chapter and any domestic corporation or corporations and foreign corporation or corporations formed for a purpose for which a corporation might be formed under this chapter may merge into one of such corporations in the following manner: The board of directors of each corporation shall, by resolution adopted by a majority vote of the members of such board, approve a plan of merger setting forth:

"(1) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is herein designated as the surviving corporation;

"(2) The terms and conditions of the proposed merger and the mode of carrying the same into effect;

"(3) The manner and basis of converting the shares of each merging corporation into shares

or other securities or obligations of the surviving corporation;

"(4) A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger;

"(5) Such other provisions with respect to the proposed merger as are deemed necessary or desirable."

"351.420. Plan of merger or plan of consolidation shall be submitted to vote at meeting of stockholders

"The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Notice of such meeting shall be given as provided in section 351.230. Such notice whether the meeting be an annual or special meeting, shall state the place, day, hour, and purpose of the meeting, and a copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice."

"351.425 Voting by shareholders on plan for merger or consolidation

"At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations."